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In The

Supreme Court Of The United States

OCTOBER TERM, 1956

No. 240

H. T. ARNOLD,
Petitioner,

vs.

PANHANDLE AND SANTA FE RAILWAY COMPANY,
Respondent.

ON WRIT OF CERTIORARI

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

QUESTION 1.

Whether the Writ of Certiorari was improvidently granted.

QUESTION 2.

Whether Petitioner was required to be on the gravel driveway while the mail truck was using same.

QUESTION 3.

Whether it is the function of a Court to construe a jury verdict, applying well recognized rules of construction thereto.

QUESTION 4.

Whether the Court of Civil Appeals correctly construed the jury verdict.

STATEMENT

1. Pleadings.

Petitioner's First Amended Original Petition, upon which the case was tried, sued Respondent and R. A. Billings jointly and severally (R. 17-23). Respondent was charged with the following seven grounds of negligence:

"A. In failing to furnish the Plaintiff a reasonably safe place to work.

"B. It failed to warn Plaintiff of the truck in the immediate vicinity where he was working.

"C. It maintained no flagman or person to protect Plaintiff while performing his duties for the railroad.

"D. It failed to furnish and maintain a blue flag for Plaintiff.

"E. It was negligent in that it permitted said truck to be operated in a careless and negligent manner in the vicinity of where Plaintiff was working.

"F. It was negligent in allowing said truck to be driven on an area normally used as a walk way.

"G. In failing to keep a proper lookout for Plaintiff."

The other Defendant, Billings, was charged with negligence in failing to keep a proper lookout, in operating without clear vision, in operating without sufficient rear view mirrors, in operating with faulty brakes, in failing to give horn warnings, in driving backward instead of forward, in driving at excessive speed, in driving on a walk way, in failing to keep the truck under proper control, and in backing the truck alongside the cars upon which Plaintiff was working.

2. Evidence.

By way of correction and supplementation, Respondent adds these facts:

Petitioner arrived at the baggage cars containing mail before the engine cut loose, and before the Billings truck arrived. Petitioner waited for the engine to cut loose, put a blue flag on the south end of the southern baggage car, and went away to do other work in another location before the Billings truck arrived. Some 20 minutes later he returned to the baggage cars, and saw the Billings truck on the driveway, backed up to a baggage car at an angle, then in the process of being loaded with mail. After observing these facts, Petitioner began and continued inspection of the baggage cars (R. 71-72), entering the northern end of the northern baggage car, passing through it and the car next south, then emerging from the middle car to the pressed gravel driveway, moving back and forth on the driveway between the second and third baggage

cars, during which operations he several times observed the Billings truck, and finally he turned his back toward the truck and began walking southward at a slow speed, and after having taken only a few steps was struck by the truck (R. 30-31).

Petitioner was senior car inspector at Lubbock, having worked about 29 years, and more or less selected his own job (R. 62).

Just east and immediately south of the passenger station at Lubbock, Texas, an old clay or caliche improvised passenger way or platform (R. 62, 145) next adjacent the westernmost railroad track at the station, had been converted into a pressed gravel hard-surface driveway for the use of Billings' truck to come alongside baggage cars located on said track to load and unload United States mail, and it was this truck that struck Petitioner (R. 153). That gravel driveway had been used daily by Billings' truck since it was constructed in December, 1950 (R. 145). The driveway was 8' 10" wide (R. 36), and immediately west of it there was a small grass plot or park upon which employees could stand or walk (R. 156), and the driveway had not been used by passengers since it was constructed (R. 150). The driveway was not wide enough to be occupied by a pedestrian and the moving mail truck at the same time and at the same location (R. 149, 150, 152).

Mail cars are brought in on this same track each morning and are unloaded, and during the day they are reloaded with mail and are not moved out until late in the afternoon (R. 156).

Culwell, Arnold's immediate superior, testified that it would take no more than 15 minutes to inspect the three baggage cars (R. 175); that there is no special time for inspecting these cars during the day; that Arnold had other work to do and should not have been working on these cars and occupying the driveway when the truck was on the driveway unloading the cars and moving on the driveway (R. 181).

There is no testimony in the entire record that it was Arnold's duty to inspect the cars or be on the pressed gravel driveway while the truck was there, and there is no testimony in the entire record that Arnold ever inspected these baggage cars on any prior occasion while the truck was standing or moving on the driveway.

3. The Court's Charge and the Jury's Verdict.

Without defining "reasonably safe place to work" (R. 310), despite Respondent's objection that such term or expression should be defined (R. 297), the Court inquired, and responsive thereto the jury found, that Respondent negligently failed to furnish Arnold a reasonably safe place to work (R. 310). The jury also found that Respondent's failure to warn Arnold of the approaching truck was not negligence (R. 311); that Respondent was not negligent in permitting the truck to use the area which Arnold was using (R. 312); that Respondent did not fail to keep a proper lookout for Arnold (R. 313); that Billings' truck driver did not fail to keep a proper lookout for Arnold (R. 313); that the truck driver's failure to give adequate warning before backing the truck was not negligence (R. 314); that it was not negligence to back the truck rather than drive it forward (R. 315); that the truck

was not backed too close to the baggage cars (R. 316); that the truck was not backed too fast (R. 317); that operating the truck without clear vision in the direction of movement was not negligence (R. 317); that Arnold did not move into the path of the truck *when his movement could not be made with safety* (R. 318); and that Arnold's failure to keep a proper lookout (the term having been properly defined) was a proximate cause of his injuries (R. 319).

Both parties moved for judgment *upon the verdict*, and the trial court rendered judgment for Petitioner (R. 340, 344, 344-352).

4. The Rulings of the Court of Civil Appeals and the Supreme Court of Texas.

The Court of Civil Appeals, recognizing that

> "The trial of the cause was conducted under the provisions of the federal law expressed in the act and decisions thereunder and it is recognized that the appeal must be determined by the same law. Florence J. Bailey v. Central Vermont Railway, Inc., 319 U. S. 350; Strickland Transp. Co. Inc. vs. Johnston, et al, 238 S.W. (2) 717" (R. 355),

construed the jury verdict and concluded that the proper judgment to be rendered thereon should have been for Respondent. It reasoned that when the verdict is viewed and construed as a whole, in connection with the pleadings, the evidence, and the manner in which the issues were submitted, since the only claim or intimation that the place of work was unsafe was because of the presence and movement of the Billings truck on the gravel driveway, and since the jury had absolved Respondent from any

dereliction in letting the truck use the area, or in not taking any of the claimed special precautions for protecting Arnold against the truck, and had absolved Billings from any of the derelictions charged against him, there was nothing remaining to support the jury's finding of failure to furnish "a reasonably safe place to work". The Court said:

> "If Appellee (Arnold) was not furnished a safe place to work by Appellant (Respondent), it was solely by reason of the fact that the truck of Billings was permitted in the area" . . . "Since the *jury found* that . . . (Respondent) was not negligent . . . in permitting motor trucks on an area used by . . . Arnold in the performance of his work, Appellant (Respondent) was entitled to judgment in the trial court *on such verdict.*" . . . "If the railway was not negligent in permitting the motor truck in the area, *then it necessarily follows that it did not fail to furnish* . . . (Arnold) . . . *a reasonably safe place in which to do his work.*" . . . "In any event, *under the jury finding,* no negligence could attach to . . . (Respondent) . . . by reason of the truck being in the area and the alleged consequent failure of . . . (Respondent) . . . to furnish . . . (Arnold) . . . a safe place to work." (emphasis supplied).

The Court then said that since the general finding of unsafe place to work had been undermined, negatived and completely destroyed by the specific jury findings exhausting the entire concept of unsafe place as developed on this record, the general finding of unsafe place was eliminated as a basis for judgment, and the specific findings were the proper basis for judgment.

The Supreme Court of Texas refused the Application for Writ of Error. (R. 392).

SUMMARY OF ARGUMENT

1. If this were a "no evidence" case, as it has been erroneously treated by Petitioner, Respondent would agree with Mr. Justice Frankfurter's able and elaborate dissent in the series of cases of *James C. Rogers*, and others, printed at pages 520-539 of the March 11, 1957 Advance Sheet, 1 L. Ed.2d, No .7, and believes that this Court should not have accepted the case, but should have denied the writ as it did in *Armstrong v. Missouri-Kansas-Texas R. Co.*, Tex. Civ. App. 233 S.W. (2) 942, writ of error dis. n.r.e. cer. den. 314 U. S. 837, and numerous other cases. The Courts below have fully recognized that the principles pronounced by this Court to guide the trial and disposition of cases arising under the Federal Employers Liability Act govern and control, and have earnestly endeavored to properly apply those principles here. The only matter at issue is the proper ownership of $18,000, and that is of interest only to the parties immediately involved.

But this is not a "no evidence" case. The case was completely tried to a jury, both parties moved for judgment *on the jury verdict*, and the Court of Civil Appeals has rendered judgment for Respondent *on the verdict*. Petitioner has miscast and misclassified the case in his petition as a "no evidence" case, and Respondent believes that this Court was thereby misled into granting the writ, and upon fuller consideration and reflection, it would appear that, in the language of Mr. Justice Harlan's concurring opinion in *Rogers*, we have here "considerations appearing which were not manifest or fully apprehended at the time certiorari was granted," so that the "rule of four"

should not obstruct a present dismissal of the writ as having been improvidently granted.

2. Respondent did not "furnish" the pressed gravel driveway to Petitioner to perform car inspecting work thereon while the Billings truck was using said driveway, but Petitioner, of his own volition, voluntarily and erroneously selected said place of work at a time and under temporary circumstances when the only conceivable cause of "unsafe place" existed.

3. A Court must construe a jury verdict, and by applying well recognized rules of construction, it must endeavor to reconcile any conflicts or superficial inconsistencies therein by construing the verdict as a whole, in the light of the pleadings, the evidence, and the manner in which the issues were submitted. That is all the Court of Civil Appeals has done.

4. The Court of Civil Appeals has properly construed the jury's verdict and has rendered judgment thereon for the proper party, and if this Court reaches the merits of this case, the judgment of the Court of Civil Appeals should be affirmed. There is no evidence of "unsafe place" except the presence and movement of the Billings truck. If "unsafe place" should be construed to embrace some imaginary thing other than the presence and movement of the truck, "unsafe place" as so defined could not possibly be a cause "in whole or in part" of Petitioner's injuries because it was the truck and the truck only that injured Petitioner.

ARGUMENT

POINT ONE

THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS HAVING BEEN IMPROVIDENTLY GRANTED.

Basically, the only question in this case is the ownership of $18,000.00. That is of interest to the immediate parties only. All the lower courts have recognized that the case arose under the Federal Employers' Liability Act and was required to be tried and decided agreeably to the principles announced and applied by this Court in such cases. There is not a single expression in the opinion of the Court of Civil Appeals which indicates any reluctance or objection on the part of that Court to follow the principles laid down by this Court for guidance in the decision of such cases, but to the contrary, its opinion evidences an earnest effort to follow those principles. A full and complete jury trial was had. Every issue that Petitioner requested was submitted, many of them over the objections of Respondent (R. 295-307). All submitted issues were answered by the jury. Both parties moved for judgment *upon the verdict.* (R. 340-344). These motions required the trial court to construe the verdict and determine which party was entitled to judgment, and it endeavored to perform that function, but there was no occasion for the Court to construe the admittedly applicable Federal Act, and that was not done. The trial court construed the verdict to entitle Petioner to judgment. The Court of Civil Appeals, affirmatively recognized that the case was tried, and "the appeal must be determined" agreeably to the holdings of this Court, and not in contravention or

derogation thereof; and it and the Supreme Court of Texas disagreed with the trial court and decided that the jury verdict, construed as a whole, in the light of the pleadings, the evidence, and the manner in which the issues were submitted, entitled Respondent to judgment *on the verdict*. That is all that has been decided. Respondent believes that the denial of certiorari by this Court in the wholly comparable "construction of verdict" cases, such as *Benson v. Missouri-Kansas-Texas R. Co.*, Tex. Civ. App., 200 S.W. 2d 233, cer. den. 332 U. S. 830, and *Missouri-Kansas-Texas R. Co. v. Roberts*, Tex. Civ. App. 225 SW (2) 198, writ of er. ref., n.r.e., cer. den. 340 U. S. 832, rehearing den. 340 U. S. 885, are the proper precedents to follow.

Petitioner in his Petition for Ceriorari, and again in his Brief, misconstrues and miscasts this case as a "no evidence" case, and cites "no evidence" cases in claimed support of his contentions. But this is clearly not a "no evidence" case, and the authorities cited and discussed by Petitioner are not in point. Petitioner does not attempt to distinguish the *Benson* and *Roberts* cases, *supra*. This Court held in *Pardee v. Aldridge*, 189 U. S. 429, that when a general jury finding is completely negatived by specific jury findings, the general finding must be disregarded, and the specific findings control. That is all that has been ruled in this case, and the ruling is consistent with the rulings made by this Court. The judgment of the Court of Civil Appeals is *on the verdict*, not in disregard of the verdict. The Court of Civil Appeals did not hold that there was "no evidence" supporting the general concept of "unsafe place to work".

It held that the evidence of "unsafe place to work" consisted only of the presence and operation of the

Billings truck upon the pressed gravel driveway, and since the jury's findings have absolved Respondent of responsibility for these specifically, *then there was no other remaining evidence or inference of unsafe place.*

Respondent respectfully submits that the proper casting of this case in its true classification must have been "not manifest or fully apprehended at the time certiorari was granted, and that the application should now be dismissed as having been improvidently granted, and that such action would not be inconsistent with or in derogation of 'rule of four'."

POINT TWO

RESPONDENT DID NOT FURNISH, BUT PETITIONER VOLUNTARILY AND ERRONEOUSLY CHOSE, TO BE UPON THE PRESSED GRAVEL DRIVEWAY WHILE THE BILLINGS TRUCK WAS UPON AND MOVING UPON THAT DRIVEWAY.

Respondent seasonably objected to Special Issue No. 1, submitting unsafe place to work, and supporting Issues 2 and 3, on various grounds, including failure to define the term, and failure to limit and restrict it as to time and place, and as being too general (R. 296-297), but the Court overruled these objections and the issues were submitted (R. 310).

Respondent has set out under "Evidence", *supra*, with appropriate record references, the major portion of the undisputed testimony which shows that Respondent did not "furnish" to Petitioner the baggage cars and the ad-

jacent pressed gravel driveway upon which to work while Billings' truck stood and moved thereon in the loading and unloading and transportation of mail, and that testimony, together with some additional, will be re-stated briefly in this Argument to give a clear over-all picture.

Billings had a contract with the Post Office Department to transport mail between the post office and Respondent's baggage cars, and to load and unload mail into and from such cars. The law requires Respondent to transport the mails, and pursuant to Respondent's duty to afford a way of ingress and egress to said cars, in December, 1950, Respondent constructed a pressed gravel driveway 10' 8" wide, straight, level, and hard-surfaced, along the west side of and adjacent to its westernmost track at the station in Lubbock (Exhibits R. 288A-288B), upon which mail cars were daily placed, to permit Billings' truck to come alongside said cars. This area was not used by passengers. The truck was instructed to enter and leave the premises from the south end of said driveway (R. 158), and since no room was provided for turning the truck, if the truck headed in, it had to back out (R. 146-147). Petitioner had seen this truck head in and back out on many prior occasions (R. 64). No trucks were permitted on the pressed gravel driveway except Billings' truck (R. 150). The station agent, in charge of the area, testified that he would not expect a man and a truck to occupy the driveway at the same time (R. 149) because it was not wide enough for both to occupy it at the same time and at the same location, and if both were using it at the same time, one would have to give way to the other (R. 149-150). There was a grass plot, or small park, adjacent to the gravel driveway on the west, upon which employees could stand or walk (R. 156).

Petitioner was the senior car inspector at Lubbock with many years' experience, and he pretty well chose his own jobs. On the morning of his injury he came to the location of three baggage cars standing on the aforesaid track, before the engine cut loose from the cars, and before the Billings truck had arrived. After the engine cut loose and before the Billings truck arrived, Petitioner placed a blue flag on the South end of the South car and then went on to another location to do other work (R. 72), the flag meaning that the cars were not to be coupled into or switched until the flag was removed (R. 177). After attending some work at another location, some twenty minutes later Petitioner returned to the three baggage cars and found Billings' truck on the pressed gravel driveway, headed generally North but cut back at an angle so as to make its open rear end more accessible to the loading of mail from the baggage car into the truck. He found railway employees in a baggage car loading mail into the truck, and he found Billings' driver on the bed of the truck with the mail then piled so high as to block the view through the rear cab window (R. 32). Having made these observations, Petitioner entered the North end of the Northernmost car, walked through the two most Northern cars, alighted onto the pressed gravel driveway from the West door of the second car, and several times observed the Billings truck while he was on the driveway, and while he did some external work alongside the second and third cars. He then turned his back to the truck and started walking slowly Southward in the driveway, and after taking a few steps, he was struck by the backing truck, which had not sounded a horn, and was knocked down and injured.

The baggage cars arrive in the morning and remain there for reloading of mail until late in the afternoon (R. 156).

Petitioner's immediate superior testified that it would have taken Petitioner about fifteen minutes to inspect these three baggage cars (R. 175); that there was no particular time to inspect them; that Petitioner had other work to do; that it was not his duty to inspect the cars and be on he pressed gravel driveway while Billings' truck was standing or moving thereon, and that Petitioner should have performed other work while the truck was there.

It was a clear day, visibility was good (R. 43), and injury was sustained shortly before 10:00 A.M.

There is no testimony in the entire record from Petitioner or any one else, that Petitioner had on this or any other occasion, been instructed to work on or about the driveway while the truck was occupying the same, or that Petitioner even thought such to be his duty; and there is no testimony from Petitioner that he had ever inspected cars and worked upon the driveway while Billings' truck occupied the same.

Respondent submits that the above recited statement from the Record in this case shows that Petitioner had no duty to be on the pressed gravel driveway at the time he was hurt; that is, at the time the truck was occupying the driveway; that he voluntarily chose to be at that location at that time, and that his choice was a mistake, wholly unexplained and unjustified by him; and that there was and is no suggestion of any other unsafe feature about the cars or the driveway other than the presence and movement of Billings' truck. This makes abundantly clear that Issue No. 1 was vulnerable to all the objections addressed

to it by Respondent, and should not have been submitted over said objections. It did not fit the situation, which had been developed by the testimony. The specific issues did fit the situation, and they completely exhausted the entire concept of "unsafe place to work," as developed in the pleadings and evidence in this case. Respondent did not "furnish"; Petitioner *chose of his own volition.* The truck had precedence there. Petitioner should have been elsewhere.

The various findings of the jury show that this was the jury's view. How else could the jury so consistently have found that railway owed Petitioner no duty to warn him of the approaching truck; owed Petitioner no duty to keep the truck off the driveway; owed Petitioner no duty to keep a lookout for him; that Billings' driver owed him no duty to keep a lookout for him, owed him no duty to give a warning of the backing truck, owed him no duty not to back; owed him no duty to back a certain distance from the cars; owed him no duty to back at a slow speed; owed him no duty to have clear vision before backing; and how could the jury have found that Petitioner's failure to keep a proper lookout for his own safety caused his injuries (R. 310-320) — unless the jury had concluded that Billings' truck had exclusive rights on the driveway at the time, and that Petitioner was in the wrong place at that time at his peril? Is it not allowable for the jury to adopt this view upon the undisputed state of the record which Respondent has just set forth? How can Petitioner contend to the contrary when he has not challenged a single one of the jury findings hereinabove set forth?

Respondent did not furnish the place for Petitioner to work at that particular time and under those circumstances. Petitioner voluntarily chose the place.

POINT THREE

A COURT MUST CONSTRUE A JURY VERDICT.

Respondent has set forth as Appendices at the back of this Brief, the most pertinent of the Texas Rules of Civil Procedure which govern the trial of a case, and define the function and duty of a Court of Civil Appeals upon an appeal from the Trial Court, in the belief that a perusal of them will aid this Court in an understanding of what has been done in this case. It will be observed that in Texas practice the parties may require a submission on special issues – it is not optional with the Judge as it is in Federal practice. The Rules define the character of special issues that are to be submitted, and they allow each of the parties to make their objections to the form and relevancy of the issues, as was done in this case. A careful Texas trial lawyer will insist that the Trial Judge frame his issues with care, and will conform them to opposing objections of generality, vaguenes and duplicity. It is a universal rule in this jurisdiction that a party, as against opposing objection, may not have a double submission of his case; he may not have it submitted both generally and specially – *Fox v. Dallas Hotel Co.*, Sup., 111 Tex. 461; *Sproles v. Rosen*, 126 Tex. 51, Sup., 84 S. W. 2d 101, and if such faulty and duplicitous submission is made, and the specific findings exhaust the entire field or concept embraced in the general submission and are in conflict therewith, the specific findings control and are the sole basis of judgment. *Sproles v. Rosen, supra; Aranda v. Texas & N. O. Ry. Co.*, Tex. Civ. App., 140 S. W. 2d, 236, error dis. Judgment correct; *Harbin v. City of Beaumont*, Tex. Civ. App., 146 S. W. 2d 297, error dis., Judgment correct. These rules of construction are in harmony with rules of construction ap-

plied by this Court. In *Pardee v. Aldridge,* 189 U. S. 429, Mr. Justice Holmes, speaking for a unanimous Court, said:

> "• • • and as the findings dealt with pure matters of fact, which it was the province of the jury to determine, so far as there was a conflict between them and those which were made under instructions, those *which expressed the free judgment of the jury would prevail.*" (Emphasis ours).

In *New Orleans Insurance Association v. Piaggio,* 83 U. S. 378, 21 L. Ed. 358, this Court said:

> "Courts also in the trial of the issues of fact often propound questions to a jury and *the rule is well settled that such a special finding even when it is inconsistent with the general verdict shall control in determining what judgment should be rendered in the case.*" (Emphasis ours).

They are also in harmony with Rule 49 of the Federal Rules of Civil Procedure. See appendix for Rule 49, Fed-ederal Rules. That is the rule of construction which the Trial Court in this case failed to apply, and it then became the duty of the Court of Civil Appeals to apply that rule, make the proper construction, and render the proper judgment. That is what the Court of Civil Appeals has done, and that is all it has done.

The verdict is required to be construed as a whole, in the light of the pleadings, the evidence, and the manner in which the issues are submitted, and all conflicts and inconsistencies must be reconciled if reasonably possible, to the end of giving effect to the jury's true finding and avoiding a second trial. *Ford v. Carpenter,* Sup., 147 Tex.

447; *Benson v. Missouri-Kansas-Texas R. Co.*, Tex. Civ. App., 200 S. W. 2d 233, error ref., n.r.e., cert. den. 322 U. S. 830; *Pardee v. Aldridge*, 189 U. S. 429.

The Court of Civil Appeals performed its bounden duty in construing the verdict. That was the only question before the Court. Respondent, as Appellant, did not seek a reversal and remand, even in the alternative, but sought only a judgment of reversal and rendition upon the verdict.

POINT FOUR

THE COURT OF CIVIL APPEALS HAS CORRECTLY CONSTRUED THE JURY VERDICT.

Under "Pleadings," supra, Respondent has set out verbatim the allegations of negligence charged against it. It will be observed that each and all of them center upon and pertain to the presence and operation of Billings' truck which struck and injured Petitioner upon a pressed gravel driveway where it was found by the jury to be authorized to operate. The pleading may be searched in vain for any claim of fact, condition, or circumstance evidencing "unsafe place" in any way or manner except the presence and the movement of the truck on the driveway. The gravamen of the complaint is that the truck was wrongfully allowed by Respondent to be upon the area, and because of that alleged wrong, it is claimed that Respondent owed Petitioner such special care as lookout, warning, and other protections against the alleged dangers of the truck.

When the testimony was heard, it was established (R. 233) that the owner of the truck had a contract with the

Post Office Department to load and unload mail into and from Respondent's baggage cars and transport it to and from the Post Office; that the mail cars were always spotted on Respondent's Westernmost track at the station in Lubbock, Texas; that West of this track and next adjacent thereto, and between the track and a grass plot or park, Respondent constructed this pressed gravel driveway ten feet and eight inches wide, straight, level, smooth and hard like pavement, for the use of this particular truck, to provide access to and exit from the mail cars. The driveway was constructed in December, 1950, had been used daily by the truck in this manner to Petitioner's knowledge, and had not been used by passengers. (R. 145).

Upon this evidence, if the jury was not required to find, certainly it was allowable for it to find, that Respondent was not negligent (Special Issue No. 8, R. 312) "in permitting such use" by the truck. And the undisputed evidence having shown that there was no particular time when these cars had to be inspected; that it took only fifteen minutes to inspect them; that they remained in the same location available for inspection from about mid-morning until late in the afternoon; that the Petitioner was senior man who somewhat picked his jobs, who had other duties to perform, who was not required or expected to occupy the driveway while the truck was using the same; that there was a conveniently adjacent grass plot or parkway upon which he could have stood or walked, next adjacent to the driveway on the West — if the jury was not required to find, certainly it was allowable for it to find, that Respondent did not owe Petitioner any special duty of protection against the hazards of the truck rightfully upon the driveway; that Billings did not owe him any special

care of warning or lookout; and that he, himself, proximately produced his own injury by negligently failing to keep a proper lookout.

Respondent asserts that these specific jury findings, made responsive to issues submitted by Petitioner, are well grounded in and supported by the evidence, and are logical and consistent. They are specific findings of fact, which is the jury's true province.

But then the jury found that the place to work "furninshed" by Respondent, was not "reasonably safe." As previously stated, the Trial Court would not say, over objection, either by definition, instruction or proper limitation as to time and place, what was meant, or what was really inquired about, in this issue.

Now, if we turn to the evidence, including the photographs (R. 288A-288B), we will find that the driveway next adjacent the track was straight, level, smooth (R. 28-29), composed of pressed gravel, "hard as this floor here" (R. 36), which might "be compared to pavement" (R. 28), ten feet eight inches wide, upon which Petitioner had walked and worked in complete safety on this very morning until he was struck and injured by the truck. How, where, or wherein, and in what manner, was the place of work, even if "furnished" by Respondent, not "reasonably safe"? It was a clear day, and there was nothing to impede visibility.

The evidence may be searched in vain for the slightest suggestion of any fact, condition, or circumstance, which would be an allowable basis for an inference to be drawn of unsafe place to work, except for the presence and movement of the truck.

But the jury has found that Respondent was not negligent in permitting the truck to be on the driveway, was not negligent in failing to give Petitioner special protection of warning and lookout against the dangers of the truck, and that Billings owed Petitioner no special care, and that Petitioner had proximately caused his own injury by failing to keep a proper lookout.

Now Petitioner says in his Brief (P. 13) that it was his duty to inspect these cars. Respondent agrees. But Petitioner does not say, nor does the evidence show, that it was his duty to inspect them at this time, under the circumstances and conditions then existing. We have reviewed the record under Point Two and shown that it was not his duty to do so at that time.

Petitioner then says in his Brief (P. 14) that the Court of Civil Appeals held that the jury's findings of "unsafe place" was a conclusion of law, without factual support, and he then goes on to concede that the real holding of the Court is (P. 14) "that there was no basis in the facts found to support a judgment." That there was no basis in the *facts found* is truly what the Court did hold. It did not at any time, or at any place, hold that there was no evidence upon which the jury could have found affirmatively upon the general issue of "unsafe place," if that had been the sole issue submitted in that field of liability. It did hold that what the jury found responsive to specific fact issues, contrary to its general conclusion of unsafe place, when the verdict is construed as a whole in the light of the pleadings, the evidence, and the manner in which the issues were submitted, completely undermined, destroyed and negatived the jury's general finding of "unsafe place."

Petitioner in his brief (P. 17-22) says that in Federal Employer Liability Act Cases, issues must be "standardized"; that "unsafe place to work is an ultimate issue"; and that the Court of Civil Appeals in casting aside the finding upon "unsafe place" as a "conclusion of law" has invaded the province of the jury. As to standardization, Respondent answers that the issues must be drawn pursuant to the Rules and Practice of the forum. See *John v. Paullin*, 231 U. S. 583, 58 L. Ed. 381. As to "ultimate issue," Respondent agrees that if unobjected to, and if not followed by a duplicate submission of specific inquiries in the same field, an issue inquiring of unsafe place is an ultimate issue. But Petitioner ignores the objections made to the issue and ignores the double submission he brought about by tendering the general submission and the specific issues embracing the entire general concept as shown and developed in this case. Petitioner cites quite a few Federal cases wherein a general finding of unsafe place, not even under attack, was generally sustained by the Court, but not one of the cases cited by him involves a general finding as well as contrary specific findings which exhaust the entire concept embraced in the general finding, as developed by the Record in the particular case.

Petitioner's claim that an issue of "unsafe place" is an ultimate issue, irrespective of the pleadings, the evidence, the opposing objections, and without regard to being being raised by both the pleadings and the evidence, and without regard to having been submitted exhaustively at Petitioner's request in specific issues, ignores all Texas Rules of Civil Procedure, all of Texas Procedural Case Law, and all State and Federal cases pertaining to the construction of a jury verdict, and the decisions of this

Court in the cases already cited. Respondent repeats, Petitioner has cited no case holding to the contrary.

Petitioner argues (P. 23) that the specific findings of no negligence in allowing the truck to be on the driveway, no negligence in failing to warn, and no negligence in failing to keep a lookout for him, "have no connection with the issue concerning unsafe place, and certainly have little, if any, bearing on the jury's answer to the issue concerning safe place and the evidence in support of such finding," but on page 30, Petitioner concedes that these three specific findings are "three evidentiary elements" of unsafe place. But Petitioner wholly fails to point out what other elements of unsafe place are shown in this Record. Petitioner fails to point out upon what other fact, circumstance or condition found in this record, the finding of unsafe place could rest. Since there is no other evidence of record evidencing unsafe place, Petitioner's argument that these specific inquiries are not in the field of unsafe place, brings him square against the universal rule that no issue will be submitted unless it is raised by some evidence. Petitioner continues to argue (P. 23-24) that he was not relying upon the facts inquired about in the specific issues to support the issue of "unsafe place," and says (P. 24): "The evidence in support of the jury's finding that Respondent failed to furnish Petitioner a safe place to work is fully set forth in the Statement herein," but the Statement may be searched in vain for any recited fact, circumstance, or condition, which suggests unsafe place about either the cars or the driveway *other than the presence and movement of the truck*, which the jury has said was rightfully there and not negligently operated. It was the truck and the truck only that knocked Petitioner down and injured him.

Petitioner then says he will (P. 24) "again point out certain salient points of evidence in this record" to show unsafe place, and he proceeds to set out that the driveway was smooth and level. He says (P. 24-25) that it was "too narrow to be occupied by the mail truck and Petitioner at the same time," but he does not say that a ten foot eight inch wide driveway was too narrow for Petitioner alone.

Petitioner unfairly treats the opinion of the Court of Civil Appeals when he says (P. 27) that that Court held that the general finding of unsafe place has "no factual support." As previously pointed out, it made no such holding. It ruled that such general finding "has no support in the (specific) facts found" (R. 358).

Petitioner says (P. 30-31) that the jury, in finding unsafe place, had a right to consider "the over-all scope of the construction, maintenance, control, and instructed use by the railway of its premises, the nature of the tasks involved, the hazards entailed, such as footing, clearance, or lack of space on the one-way passageway." Where is any evidence in this record, even remotely suggesting improper or negligent "construction, maintenance, control"? There is none. What were the "hazards entailed" except the presence and movement of the truck? There were none. What was wrong with "footing," shown to have been pressed gravel, hard, level, and smooth like a floor or pavement? There is nothing to suggest faulty footing, but Petitioner's own testimony refutes it.

Petitioner argues that the jury is entitled to speculate. Indeed, under the rulings of this Court, where the testimony is in conflict, or where different inferences may be drawn from the same testimony, the jury is allowed to speculate, and draw the inference or conclusion which it

thinks most reasonable. But Petitioner cites no case which holds that the jury can speculate without some fact basis as a field in which to "speculate" in the sense of "suppose," "imagine," "wish," or "dream".

But if Petitioner's argument that "unsafe place" may be supported by some "imaginary" or "supposed" fact, circumstance, or condition, wholly unrelated to the presence and movement of the truck, should be adopted, Petitioner's position would be no better, because such other "supposed" or "imaginary" thing could not possibly be the cause, "in whole or in part" of Petitioner's injuries. It was the truck, and the truck only that knocked Petitioner down and injured him. According to Petitioner's own testimony, as he walked along on the driveway, the first and only disturbance or interference with his comfort and safety perceived by him, was the truck's striking him off the ground and propelling him through the air, causing him to fall prone, face downward on the driveway, and running its dual wheel over him before he could right himself or crawl out of its path. There was no other cause "in whole or in part" of Petitoner's injuries except the truck.

It would seem that Petitioner's argument that the Texas Rules of Civil Procedure should not apply in a Federal Employers' Liability Act case, and that while a Court might construe a jury verdict in an ordinary negligence case, it may not do so in a Federal Employers' Liability Act case, scarcely requires answer. The Texas Rules of Civil Procedure were promulgated by the Supreme Court of Texas pursuant to Article V, Section 25, of the State Constitution (Vernon's Constitution of the State of Texas, page 321), and a special Act of the Legislature (Art. 1731a, V.A.C.S.), with the advice and counsel of a large

committee of the ablest lawyers and Judges of Texas (Vernon's Annotated Texas Rules, Pages XXIII-XXV). They are designed to govern all civil trials in the Courts of Texas. Their purpose is to guarantee a fair trial to plaintiff and defendant. They are not designed to guarantee victory to either side.

Respondent submits that the Court of Civil Appeals' construction of the jury verdict is obviously correct, and that its judgment is likewise correct.

CONCLUSION

Petitioner first submits that the writ of certiorari should be dismissed as having been improvidently granted, and then submits, that if the case is examined on its merits, it will be found that the Court of Civil Appeals has correctly construed the jury verdict, has rendered judgment for the right party, and its judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Preston Shirley, one of the attorneys for Respondent, Panhandle and Santa Fe Railway Company, and a member of the bar of the Supreme Court of the United States, do hereby certify that Petitioner, H. T. Arnold, was served with copies of Respondent's Brief in accordance with Rule 41 by depositing copies of such brief in the United States Post Office at Lubbock, Texas, first-class, postage prepaid, addressed to counsel of record for Petitioner, Henry D. Akin, Jr., 505 North Ervay, Dallas 1, Texas, and J. O. Bean, 10th Floor, Gulf States Building, Dallas, Texas, sending two copies of such brief to each of them on the 12th day of April, 1957, in accordance with Sections 1 and 3(b) of Rule 33 of the Revised Rules of the Supreme Court of the United States.

Preston Shirley

Preston Shirley
Counsel of Record for Respondent

APPENDIX

RULE 271, TEXAS RULES OF CIVIL PROCEDURE

Charge To The Jury

Unless expressly waived by the parties, the judge shall prepare and in open court deliver a written charge to the jury. If the case is submitted on a general charge, he shall instruct the jury on the law applicable to the case. If the case is submitted on special issues, he shall submit the issues of fact to the jury.

RULE 272, TEXAS RULES OF CIVIL PROCEDURE

Requisites

The charge shall be in writing, signed by the judge, and filed with the clerk, and shall be a part of the record of the cause. It shall be prepared after the evidence has been concluded and shall be submitted to the respective parties or their attorneys for inspection, and a reasonable time given them in which to examine and present objections thereto, which objections shall in every instance be presented to the court in writing before the charge is read to the jury, and all objections not so made and presented shall be considered as waived. When written objections have been so made and presented, if the court overrules same, he shall endorse his ruling thereon and sign the same officially, and when the same is so endorsed, it shall constitute a sufficient bill of exception to the ruling of the court thereon, and when so endorsed by the judge it shall be presumed, unless otherwise noted thereon, that the party making such objections presented the same at the proper time and excepted to the ruling thereon. The re-

quirement that the objections to the court's charge shall be in writing will be sufficiently complied with if such objections are dictated to the court reporter in the presence of and with the consent of the court and opposing counsel, before the reading of the court's charge to the jury, and are subsequently transcribed and the court's ruling and official signature endorsed thereon and filed with the clerk in time to be included in the transcript. Failure of the court to give reasonable time to the parties or their attorneys for examination of the charge shall be reviewable upon appeal upon proper exception. The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence, and so as to instruct the jury as to the law arising on the facts, and shall only submit controverted questions of fact. Amended by order of September 20, 1941, effective December 31, 1941.

RULE 274, TEXAS RULES OF CIVIL PROCEDURE

Objections and Requests

A party objecting to a charge must point out distinctly the matter to which he objects and the grounds of his objection. Any complaint as to an instruction, issue, definition or explanatory instruction, on account of any defect, omission, or fault in pleading, shall be deemed waived unless specifically included in the objections. Where the objection made by the complaining party, or an instruction, issue, definition, or explanatory instruction requested by him, is in the opinion of the appellate court obscured or concealed by voluminous unfounded objections, minute differentiations or numerous unnecessary requests, such

objection or request shall be untenable. No objection to one part of the charge may be adopted and applied to any other part of the charge by reference only. Amended by order of September 20, 1941, effective December 31, 1941.

RULE 277, TEXAS RULES OF CIVIL PROCEDURE

Special Issues

"In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the Court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided, that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanetly or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to

properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

RULE 279, TEXAS RULES OF CIVIL PROCEDURE

Submission of Issues

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party.

Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or expanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

RULE 301, TEXAS RULES OF CIVIL PROCEDURE

Judgments

The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all the relief

to which he may be entitled either in law or equity. Provided, that upon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper, and provided further that the court may, upon like motion and notice, disregard any Special Issue Jury Finding that has no support in the evidence. Only one final judgment shall be rendered in any cause except where it is otherwise specially provided by law. Judgment may, in a proper case, be given for or against one or more of several plaintiffs, and for or against one or more of several defendants or intervenors.

RULE 434, TEXAS RULES OF CIVIL PROCEDURE

If Judgment Reversed

When the judgment or decree of the court below shall be reversed, the court shall proceed to render such judgment or decree as the court below should have rendered, except when it is necessary that some matter of fact be ascertained or the damage to be assessed or the matter to be decreed is uncertain, in either of which cases the cause shall be remanded for a new trial.

Provided, first, that no judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause the rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appear to the court that the error affects a part only of the

matter in controversy, and the issues are severable, the judgment shall only be reversed and a new trial ordered as to that part affected by such error.

Provided, second, that if the erroneous action or failure or refusal of the trial judge to act shall prevent the proper presentation of a cause to the Court of Civil Appeals, and be such as may be corrected by the Judge of the trial court, then the judgment shall not be reversed for such error, but the appellate court shall direct the said judge to correct the error, and thereafter the Court of Civil Appeals shall proceed as if such erroneous action or failure to act had not occurred. Amended by Order of March 31, 1941.

RULE 49, FEDERAL RULES OF CIVIL PROCEDURE

Special Verdicts and Interrogatories

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission

to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General Verdict Accompanied by Answer to Interrogatories. The Court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.